

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Final Decision on Attorney Fee Application

**L.E. Fisher and Douglas Krisberg,
Complainants**

GRC Complaints No. 2002-46 and 2002-55

v.

**City of Paterson,
Custodian of Record.**

**Decision Issued: August 14, 2003
Decision Effective: August 22, 2003**

By Order in each of the above captioned matters issued December 12, 2002, the Government Records Council found that the \$150.00 fee imposed by the custodian for access to the police blotter or "log" sought in each case was not justified under OPRA and that requestors could be charged only the standard per-page copy charge under OPRA for copies of those records. The Council found both requestors prevailing parties under OPRA and instructed them to attempt amicable resolution of their claim for attorney's fees with the City records custodian.

On January 14, 2003 the applicant, requestors' counsel Richard Gutman, Esq., advised negotiations had failed and submitted to Council a written application for a total of \$18,830.00 in fees, comprised of 17.81 hours of work leading to the GRC Final Decision and another 22.58 hours of work related to the fee application, multiplied by an hourly rate of \$356.25, with the resulting figure being multiplied by a 70% "enhancement." The applicant submitted a single fee application as he represented both requestors and discussed both cases in a single submission.

At its meeting on August 14, 2003, the Council considered the applicant's fee application, including Final Decisions issued December 12, 2002; the Acting Executive Director's Findings and Recommendations dated December 6, 2002; requestors' application for fees dated January 14, 2003; communications on behalf of the requestors dated February 16, 2003; communications on behalf of the custodian dated February 6 and 20, 2003; and the Acting Executive Director's Supplemental Findings and Recommendations dated August 8, 2003 which concluded that:

- The work could reasonably have been accomplished in 12.13 hours;
- The reasonable hourly rate for the applicant was \$150.00;
- The reasonable attorney fee in total was \$1,819.50; and,
- A contingency fee "enhancement" is not appropriate for an attorney fee award under OPRA.

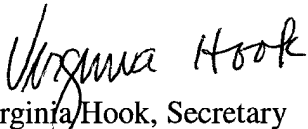
By affirmative vote of four members, the Council voted to adopted and incorporate the Acting Executive Director's Supplemental Findings and Recommendations dated August 8, 2003 awarding requestors \$1,819.50 in attorney fees and dismissing the Complaint.

A copy of this Order shall be provided to the requestors, the custodian and all legal counsel of record.



VINCENT MALTESE, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council:



Virginia Hook, Secretary
Government Records Council
Dated: August 22, 2003

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplementary Findings and Recommendation of Executive Director
August 14, 2003**

**L.E. Fisher and Douglas Krisberg
Complainants**

v.

**City of Paterson
Custodian of Record**

GRC Complaints No. 2002-46 and 2002-55

Relevant Record Requested: Police Department blotter or log

Requestors: Richard Gutman on behalf of Linda Fisher and Douglas Krisburg

Custodian: Jane E. Williams-Warren, Municipal Clerk

Alleged OPRA violation: Charge of \$150.00 for copy of police blotter

Case status: GRC adjudicated that \$150.00 was improper charge and only charge should be the cost of the copy. GRC found requestors to be prevailing party and reserved fee award issue.

Executive Director's Preliminary Recommendation

The GRC previously adjudicated that the \$150 charge the custodian imposed for a copy of the police blotter was improper and that the requestor was a prevailing party. The remaining issue to be adjudicated by the GRC is the determination of a reasonable attorney's fee to be awarded the requestors.

The Executive Director finds and recommends that the Council find that:

- A reasonable number of hours for the work performed is 12.13;
- A reasonable hourly rate is \$150.00; and
- Based upon the reasonable number of hours times the reasonable rate, the reasonable attorney fee which should be awarded is \$1,819.50;
- A contingency fee enhancement is not appropriate in an attorney fee award under OPRA.

Procedural History

Richard Gutman sought a copy of a police blotter for a given day from the City of Paterson on July 2, 2002, and on behalf of Douglas Krisburg on September 18, 2002. The City of Paterson charged \$150 for a copy of the blotter. Fisher paid the \$150.00 and received a copy of the police blotter. Krisburg did not pay the charge and did not receive the requested document. The parties filed complaints (2002-46 and 55, respectively) with the GRC alleging that the \$150.00 charge was an OPRA violation. Richard Gutman represented both requestors as counsel.

At its December 12, 2002, public meeting, the GRC considered both complaints, and the Council decided by affirmative vote of all five members to award relief as follows:

- The custodian shall charge the requestor only the per page copy rates in N.J.S.A. 47:1A-5(b) for the record in question.
- With respect to Linda Fisher, the custodian shall refund to her any sum paid that exceeds the per page copy for the cost of the record in question.
- Fisher and Krisburg are prevailing parties pursuant to N.J.S.A. 47:1A-7(f), and they are entitled to attorney's fees from the custodian

The Council ordered the parties to attempt to reach an amicable resolution by 5:00 PM on January 13, 2003 concerning the amount of fees due the requestors and to advise the Council in writing of the terms of any agreement. If the parties were not able to agree on the amount of fees, the Council directed the requestors to submit no later than 5:00 PM. January 15, 2003, a written application for fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). In this event, the Council also determined that the custodian would have an opportunity to respond to the application and the requestors would have an opportunity to reply thereto; and that the Council shall reach a final decision concerning the amount due the requestors at a subsequent meeting.

The parties did not reach an amicable resolution of the attorney fee issue by January 13, 2003. The requestors' attorney submitted a joint fee application and the required attorney affidavit on January 14, 2003 along with a Certification of Richard Gutman. The attorney for the custodian submitted a response to the fee application on February 6, 2003. The requestors' attorney submitted a reply thereto on February 16, 2003, and an amended attorney's fee application along with a supplemental certification on that same date.

In his amended fee application, the requestors' attorney is seeking \$18,830.00 which breaks down into 17.81 hours for work relating to obtaining the GRC final decision at \$356.25 per hour

multiplied by a 70% contingency enhancement for a total of \$10,786.18 and 22.58 hours related to the fee application at \$356.25 per hour for a total of \$8,044.12.

Legal Principles of Attorney Fees

New Jersey case law provides that a reasonable attorney's fee is determined by determining the "lodestar," an amount which is the reasonable number of hours multiplied by a reasonable hourly rate.

A series of New Jersey court cases¹ provide directives in determining a reasonable number of hours for the work on the case as well as the petition for award of fees. These include:

- Excessive, redundant, unproductive or otherwise unnecessary hours are not reasonably expended and compensation is not due for these type of hours;
- The number of hours claimed may be reduced for the number of hours spent litigating claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed;
- There is no proportionality requirement between the damages awarded and the counsel fee recovered. However, if the specific circumstances show that the hours, considering the possible damages, the interests at issue and the statutory objectives, exceed the number that competent counsel would have reasonably expended to achieve a comparable result, then the court may use discretion to exclude excessive hours;
- The "lodestar" fee may be reduced if the level of success achieved is limited compared to the relief sought;
- The applicant is entitled to a reasonable fee award for the fees incurred in relation to his fee petition; and
- The goal in setting forth standards to determine a reasonable fee payable under fee shifting statutes is to ensure the legislative objective of fee-shifting statutes while sharply discouraging collateral litigation of reasonable fee issues.

Further, the United States Supreme Court has stated that a request for attorney's fees should not result in a second major litigation.

Analysis

In reaching recommendations on the amount of a reasonable attorney fee, the Executive Director has relied on advice from counsel in the Division of Law. For the sake of brevity, the requestor's attorney will be referred to as the "applicant."

1. Determining the reasonable number of hours for the time spent on the complaint

¹ The leading case on this subject is Rendine v. Pantzer, 141 N.J.S.A. 292 (1995).

Considering that this case involved a straightforward, uncomplicated issue where the custodian did not even dispute that the relevant record is a public record, the number of hours requested by the applicant is **not reasonable** when considering the above legal guidelines for determining a reasonable fee.

This case involved a simple issue that required minimal legal analysis. The applicant's work in handling the issue in the GRC Complaint included writing a few uncomplicated, straightforward documents and letters. Many of the hours sought are excessive or unnecessary.

The submission of the applicant breaks down into five categories: drafting the complaint, legal research, the claim regarding motion practice, responding to and reviewing correspondence and the Executive Director's Findings and Recommendation, and attending a GRC meeting.

a. Drafting complaint time entries:

Date	Activity	# of hours	Allowable
8/23/02	Research, write Fisher's complaint	1.0	
9/30/02	Write Krisburg's complaint	.33	
10/7/02	Talk to Linda Stancil regarding complaints	.15	
10/8/02	Write letter to Clerk regarding complaints	.33	
10/20/02	Write amendment (supplement) to complaints	2.5	
10/23/02	Write amendment to complaints	.15	
10/26/02	Write amendment to complaints	.85	
10/30/02	Write amendment to complaints	.45	
	Total	5.76	1.5

This number of hours is excessive, considering that the initial Complaints were forms he had to fill out and that the subject matter of the Complaints and the Amendment to the Complaints dealt with an uncomplicated, simple matter. The case involved no separate counts or novel legal theories. The amendment to the complaints was repetitive and unnecessarily long. Such overworking of a complaint is not intended by OPRA; a law that seeks to streamline the complaint process without the necessity of attorneys and places the burden of proof on the issue on the custodian.

For these reasons, it is suggested that a reasonable number of hours for the "Drafting Complaint time entries" is 1.5 hours.

b. Legal research

Date	Activity	# of hours	Allowable
10/23/02	Research law	1.4	.7

The research falls in between the previous entries indicating the applicant was amending the complaints. Other than citing the language of OPRA, the applicant cites only one case. Because the applicant states in his Certification that his practice concentrates on cases under OPRA (and in fact has written articles in the legal press about it), he should be familiar with its provisions. Given the uncomplicated issue which is the subject matter of the Complaint and that the applicant's research evidences only one case, which he cites for a proposition and not, for example, a

complicated legal analysis, **.7 hours is a reasonable number of hours attributable for this research.**

c. Claim regarding motion practice

Applicant also seeks **.85** hours related to calling the custodian's attorney regarding service and preparing a motion regarding service. A review of this motion shows that the applicant filed the motion requesting the GRC to require the custodian's counsel to serve him with papers. No such motion is mentioned under OPRA. Prior to filing the motion, Mr. Gutman indicates he had already received copies of the custodian's papers filed by their attorney from the GRC.

Therefore, the motion was unnecessary and no time should be awarded for either entry.

d. Responding to and reviewing correspondence and Executive Director's Findings and Recommendation

Date	Activity	# of hours	Allowed
11/27/02	Read preliminary recommendation	.2	
11/27/02	Write emails to Krisburg, Zaks and GRC	.5	
12/03/02	Read GRC email, read Paterson supplemental statement	.45	
12/09/02	Read Paterson's letter to GRC staff	.35	
12/9/02	Read GRC Executive Director's two Findings/ Recommendation documents, prepare response to Paterson's letter	2.75	
12/10/02	Prepare response to Paterson's letter	1.5	
	Total	5.75	2.15

Again, the subject matter of this activity is relatively simple and straightforward and does not involve a complicated fact pattern. While the entries for 11/27-12/03 appear reasonable, the other entries are not reasonable.

The City of Paterson's letter to GRC staff is a one-page letter with a one-page attachment, and the Executive Director's Preliminary Findings and Recommendations is a three and a quarter page document, neither of which would involve difficulty in comprehension of complex legal theories. Even though there were two Executive Director's Findings and Recommendation (preliminary and final), they were the same in substance. Further, the applicant's response is two pages and does not involve complex issues or rely on legal research. **Based on the foregoing, 2.15 hours is a reasonable amount of time for the above work.**

e. Attending GRC meeting

Date	Activity	# of hours	Allowed
12/12/02	Travel to GRC meeting	1.45	1.45
12/12/02	GRC meeting	1.4	1.4
12/12/02	Return from GRC meeting	1.2	1.2
	Total	4.05	4.05

The remaining time entries involve obtaining the final decision at a GRC meeting. It is reasonable for a requestors' attorney to attend the meeting where his clients' complaints would be decided and the travel time is reasonable.

Therefore, for the time spent in obtaining the GRC final decision, 8.4 hours is a reasonable number of hours.

2. Determining the reasonable number of hours for the time spent on the fee petition;

The applicant is seeking a total of 22.58 hours at \$356.25 per hour for work on the amount of fees to be awarded to him, because his clients are prevailing parties in this case. Thus, he is seeking 4.77 more hours for the fee application work than for his actual work in obtaining the GRC final decision. This number of hours is excessive and unreasonable and appears to be the exact type of excessive work with respect to a fee dispute that the above courts sought to avoid. The applicant shows the following time entries relating to the amount of attorney's fees he claims:

Ref. #	Date	Activity	# of hours	Allowed
1	12/13/02	Write letter to Zaks regarding fees	.4	.2
2	12/17/02	Talk to Zaks regarding fee request	.2	.2
3	12/18/02	Write certification	1.7	.5
4	1/13/02	Prepare application for attorney's fees	.9	.5
5	2/11/03	Read Patterson's February 6 letter	.33	.33
6	2/11/02	Write reply to Paterson's February 6 letter	8.05	2.0
7	2/12/03	Research and write reply to Paterson's February 6 letter	3.6	
8	2/13/03	Travel to law library	.5	
9	2/13/02	Research reply to Paterson's February 6 letter	3.95	
10	2/13/02	Travel from library	.5	
11	2/15/03	Write reply to Paterson's February 6 letter	2.45	
		Total	22.58	3.73

The following analysis considers each of the foregoing entries in turn.

1. .2 is a reasonable time for a short letter of this nature.
2. This entry is reasonable.
3. 1.7 hours to write the Certification is unreasonable. The Certification contains information readily available to the applicant, largely includes the applicant's biographical information and credentials, and does not give any detailed discussion of any legal theories or case law. Thus, .5 is a reasonable amount of time for drafting the Certification.
4. The attorney fee application is a straightforward, uncomplicated 1¼-page document. .9 is excessive; .5 is a reasonable amount of time for this document.
5. This entry is reasonable.

The remaining items (6-11) all relate to responding to the custodian's February 6 letter, a total of 19.38 hours.

- One hour of this time (items 8 and 10) is charged for traveling to and from the law library. This charge is unreasonable. Allowing this time would be no different than allowing an attorney who has a library in his law office to charge for the time from his

- home to his office law library where he researches an issue. The custodian should not be penalized because the applicant uses a law library outside of his office.
- The remaining 18.38 hours that the applicant charges is for researching and writing the reply to the February 6 letter. The applicant's reply is eleven pages long and disputes the custodian's letter by making uncomplicated legal arguments and setting forth alleged facts. The reply includes minimal research and the research which is set forth is used to state legal propositions and is not discussed in any detail or for purposes of factual comparative analysis. Moreover, the time expended is especially unreasonable considering that it was spent in defense of attorney's fees incurred with regard to the access issue that are unreasonable and excessive. As such, a reasonable amount of time to reply is 2.0 hours.

Therefore, the total number of reasonable hours that should be awarded for seeking fees is 3.73 and the total number of reasonable hours for the case is 12.13.

3. Determining the reasonable hourly rate

A reasonable fee should be calculated according to the prevailing market rates in the "relevant community." Relevant community means lawyers of similar experience, skill and reputation practicing the same type of law in a geographical area. This means the Council needs to assess the experience and skill of the applicant and compare that rate to the prevailing rates in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. The determination of a reasonable hourly rate need not be unnecessarily complex or protracted but the Council should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments.

The applicant bears the burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered. If the evidence is inadequate, the Council may rely upon its own expertise in determining a reasonable hourly rate.

In this case, the applicant has not submitted sufficient proofs to enable the Council to determine his reasonable rate.

The applicant's submissions show that the applicant does not bill his client an hourly rate, and thus, he has no billed rate that he is claiming, and additionally, we do not know what clients would be willing to pay him. The applicant bases his requested rate on an average of the high and low rates of partners in New Jersey law firms obtained from a survey in the New Jersey Law Journal. This comparison is not very persuasive as the comparison rates are taken from New Jersey law firms, some of which are large and none of which are solo practitioners.

The rates for lawyers in law firms may be higher than the rate for a solo practitioner to account for the overhead of large firms. Additionally, the survey is very general; the applicant submits no evidence that these attorneys practice in the same or a similar legal community as him or bear a reasonable comparison to the applicant with respect to skill, reputation and experience. Similarly, there is no indication of what fees are charged for "similar services."

The applicant also states that in the last year the only fee he has charged or been paid or awarded is at a rate of \$355.00 an hour in a case in front of the U.S. District Court for the Northern District of Illinois in a civil rights case which is now on appeal. This information is unhelpful because there is no proof submitted that this case is even remotely similar to the present case.

Because there is insufficient proof of a reasonable rate, the Council must look at other considerations for a determination of a reasonable rate. Other considerations are:

- The custodian's attorney, who is a solo practitioner practicing in Essex County and has been admitted to a state bar since 1973 (like the applicant), charges between \$150.00 and \$200.00 an hour.
- The State of New Jersey routinely pays its outside counsel \$130.00 an hour regardless of the complexity of the case, i.e. even in sexual harassment lawsuits and catastrophic injury cases.
- The State's Merit System Review Board has a sliding scale of how it awards attorney fees for attorneys appearing before it:
 - Partners, or their equivalent, in a law firm with fifteen or more years of experience in the practice of law, or notwithstanding years of practice, a practice concentrated in employment or labor law, have a range of between \$175.00 and \$200.00. It should be noted that the regulation refers to partners in a law firm and so in setting the rate would seem to consider the overhead of a law firm.
 - State Merit System Review Board proceedings rates may be higher than those awarded under OPRA to account for the varying complexity of those cases as well as the more intensive pre-hearing preparation work.
- The New Jersey Housing and Mortgage Finance Agency may approve attorney services to be paid out of project funds up to \$125.00 for general legal matters and, with regard to general litigation, up to \$175.00 for non-trial hours and up to \$200.00 for trial hours.
- This case involved uncomplicated issues that did not require a high level of skill and senior attorney rates should not be charged for basic legal work. Accordingly, associate level rates are more appropriate.

Therefore, based upon the limited proof submitted in this case and the aforesaid considerations, it would appear that a reasonable hourly rate for the applicant is \$150.00. Multiplying this rate times the reasonable number of hours of 12.13 hours, \$1,819.50 is a reasonable attorney fee to be awarded the applicant in this matter.

Finally, the custodian has argued that no fees should be awarded, because the applicant had no written contingency fee agreement. Where, as here, an attorney has not regularly represented a client, State court rules require a written communication of the fee and that contingency fee agreements be in writing. It is not clear whether the arrangement here falls under this requirement, although it does appear that it is covered by the plain language of the rule, which applies to fees contingent on the outcome of the matter.

The Council does not need to decide this issue, because the courts have held that the absence of a written contingency fee agreement will not preclude counsel from recovering the reasonable value of services rendered.

4. Is a contingency fee enhancement authorized, and if so, at what rate.

The applicant is also requesting a contingency fee enhancement of 70% for the work related to obtaining the GRC final decision. OPRA does not permit the award of a contingency fee enhancement. Accordingly, the Council lacks the authority to grant a request for fee enhancement.

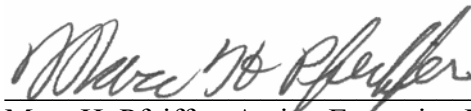
In reaching this conclusion, it is important to consider that the New Jersey Supreme Court's award of contingency fee enhancements in *Rendine v. Pantzer*, is in the context of New Jersey's Law Against Discrimination (NJLAD), which has as its important public policy, the elimination of workplace discrimination. An enhancement is uniquely appropriate under NJLAD to encourage lawyers to take workplace discrimination cases, who otherwise might be discouraged by the expense of discovery and trial where there is a significant risk of nonpayment. While the public policy under OPRA is important, it is not on the same par as the eradication of workplace discrimination.

OPRA cases involve easy, expedited litigation. Additionally, unlike the Law Against Discrimination, OPRA contains an internal enforcement mechanism, the GRC, which is set up as a route to resolution of records disputes that avoids protracted litigation, allows requestors to proceed without a lawyer, and encourages pre-adjudication resolution through its provision of mediation. The fee-shifting portion of OPRA is sufficient to ensure enforcement of its intended policy.

Further, in awarding fees against a governmental entity, the adjudicating body has the task of compensating the attorney a reasonable fee while seeking to neither encourage nor discourage attorneys from bringing meritorious cases against governmental entities. The adjudicating body needs to exercise its discretion in the context of a recognition that limited public funds are available for such purposes. Because an award of attorney's fees under OPRA will always be against a governmental entity, the public fisc will always be exposed making fee enhancement inappropriate under principles of taxpayer fairness and sovereign immunity.

Thus, OPRA does not authorize the award of a contingency fee enhancement. Accordingly, the Council lacks the authority to grant a request for fee enhancement.

To summarize, based on the facts of this case, the Executive Director recommends that the applicant be awarded reasonable attorney fees based on an hourly rate of \$150/hour for 12.13 hours for a total of \$1,819.50, the request for enhancement be denied and the remaining portion of the Complaint be dismissed.



Marc H. Pfeiffer, Acting Executive Director
Government Records Council

Dated: August 8, 2003